

September 28, 2000

Jamie Rappaport-Clark
Director
United States Fish and Wildlife Service
1849 C Street NW
Mail Stop 3012
Washington, DC 20240

RE: Requirements for Regulatory Flexibility Act Compliance in Critical Habitat Designation

Dear Ms. Rappaport-Clark:

By way of introduction, the Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305 to represent the views of small business before federal agencies and Congress. Advocacy is also required by §612(a) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612) to monitor agency compliance with the RFA. The Chief Counsel of Advocacy is authorized to appear as *amicus curiae* in regulatory appeals from final agency actions, and is allowed to present views with respect to compliance with the RFA, the adequacy of the rulemaking record with respect to small entities, and the effect of the rule on small entities. *Id.* On March 28, 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act (SBREFA), Pub. L. 104-121, which made a number of significant changes to the RFA, the most significant being provisions to allow judicial review of agencies' compliance with the RFA. 5 U.S.C. §611.

Recently, the Fish and Wildlife Service (FWS) published the following proposed rules in the Federal Register:

- July 6, 2000 Endangerment and Threatened Wildlife and Plants; proposed Determination of Critical Habitat for Wintering Piping Plovers, Federal Register, Vol. 65, No. 130, p. 41782
- July 6, 2000 Endangerment and Threatened Wildlife and Plants; proposed Determination of Critical Habitat for the Great Lakes Breeding Population of the Piping Plover, Federal Register, Vol. 65, No. 130, p. 41812
- July 12, 2000 Endangerment and Threatened Wildlife and Plants; proposed Determination of Critical Habitat for the Morro Shoulderband Snail, Federal Register, Vol. 65, No. 134, p. 42962

The purpose of the proposed rules is to designate the respective species as critical habitat pursuant to the Endangered Species Act of 1973, as amended (ESA).

If the proposals were made final, Federal agencies would be prohibited from funding,

carrying out, or authorizing any act that would destroy or adversely modify critical habitat. According to FWS, the following activities have the potential to destroy or adversely modify critical habitat:

- (1) Regulation of activities affecting waters of the United States by the U.S. Army Corps of Engineers under section 404 of the Clean Water Act;
- (2) Regulation of water flows, water delivery, and diversion by Federal agencies;
- (3) Sale, exchange, or lease of lands owned by a Federal agency;
- (4) Road construction and maintenance and right-of-way designation;
- (5) Funding of low-interest loans to facilitate the construction of low-income housing by the Department of Housing and Urban Development;
- (6) Hazard mitigation and post-disaster repairs funded by the Federal Emergency Management Agency;
- (7) Promulgation of air and water quality standards under the Clean Air Act and the Clean Water Act and the cleanup of toxic waste and superfund sites under the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act by the U.S. Environmental Protection Agency;
- (8) Issuance of Endangered Species Act section 10(a)(1)(B) permits by the Fish and Wildlife Service; and
- (9) Activities funded, carried out, or authorized by any Federal agency.

According to FWS, small entities carry out many of the activities sponsored by Federal agencies within the proposed critical habitat areas. The activities are carried out by small entities through contract, grant, permit, or other Federal authorization.

Regulatory Flexibility Act Requirements

The RFA requires administrative agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments. See 5 U.S.C. § 601, et. seq.; Northwest Mining Association v. Babbitt, 5 F. Supp. 2d 9. When an agency issues a rulemaking proposal, the RFA requires the agency to “prepare and make available for public comment an initial regulatory flexibility analysis” which will “describe the impact of the proposed rule on small entities.” 5 U.S.C. § 603(a); *Id.*

Initial Regulatory Flexibility Analysis

The RFA requires agencies to consider the impact that a proposed rulemaking will have on small entities. If the proposal is expected to have a significant impact on a substantial number of small entities, the agency is required to prepare an initial regulatory flexibility analysis describing the reasons the action is being considered; a succinct statement of the objectives of, and legal basis for the proposal; the estimated number and types of small entities to which the proposed rule will apply; the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; all relevant Federal which may duplicate, overlap, or conflict with the proposed rule; and the significant alternatives that accomplish the stated objectives of the of the statutes and that minimize any

significant economic impact of the proposed rule on small entities. 5 U.S.C§ 603. The IRFA or a summary of the IRFA shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking. 5 U.S.C§ 603

In complying with section 603, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule. A more general descriptive statement may be used if quantification is not practicable or reliable. 5 U.S.C§ 607.

Certification In Lieu Of an IRFA

Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification, the agency shall publish such a certification in the Federal Register at the time of the publication of the general notice of proposed rulemaking along with a statement providing the factual basis for the certification. *See* 5 USC§ 605.

RFA Non-Compliance in Proposed Rulemakings

In the RFA sections of the three proposals, FWS states that it will determine whether designation of critical habitat will have a significant effect on a substantial number of small entities. In the economic analysis section of the proposals, FWS states that it will conduct an analysis of the economic impacts of the critical habitat designation prior to a final determination. Upon completion, FWS will announce the availability of the draft economic analysis with notice in the Federal Register and open a 30-day comment period at that time.

Advocacy asserts that simply asserting that FWS will determine whether designation of critical habitat will have a significant effect on a substantial number of small entities in the economic analysis is not sufficient for RFA purposes. Although the RFA does not require an agency to perform a duplicative analysis of the impact, it does require the agency to consider specific elements that may not be required in ESA Section 4(a) economic analysis. Whereas the RFA provides a detailed description of the elements that the agency must consider in determining the economic impact of a particular action on small entities, the ESA merely states that economic impact shall be taken into consideration. 16 U.S.C. § 1533. It is void of specific requirements like the consideration of alternatives, description of the industry, etc. that are found in the RFA.

Moreover, the RFA requires that the IRFA or the summary of the IRFA be published at the time of the proposal. Advocacy acknowledges that in the past we have advised FWS to make a statement that the IRFA would be completed and published at a later date. However, the statement provided indicates that an economic analysis that may not have all of the elements of an IRFA will be prepared but not published.

Simply providing notice of availability is not sufficient for RFA purposes. The law requires the agency to publish the IRFA or the summary of the IRFA for public comment. Likewise, if the impact is not significant, the certification, along with its factual basis must be published.

Conclusion

The RFA is intended to ensure that an agency has sufficient information to make regulatory decisions that are sensitive to the economic impact of the action on small entities during consideration of the rule and to take these impacts into account before proposing a rule. If the agency does not perform the analysis until sometime after the publication of the rule, it is not making a good faith effort to comply with the RFA. While Advocacy acknowledges that on the issue of the Coastal California Gnatcatcher Advocacy advised FWS to make a statement that the RFA analysis would be published within 30 days of the proposal, that was not meant to be a standard practice. Advocacy was only providing a temporary option for that regulation because FWS had to comply with a court order. FWS' decision to use that approach systematically to address its RFA obligations thwarts the intent of the RFA and denies the public of the opportunity to review the material and make meaningful comments.

Thank you for the opportunity to comment on this proposal. If you have any questions, please feel free to contact us. Please place a copy of these comments in the record of each proposal.

Sincerely,

Jere W. Glover
Chief Counsel
Office of Advocacy

Sincerely,

Jennifer A. Smith
Assistant Chief Counsel
for Economic Regulation